

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 11 of the	)	
Cable Television Consumer Protection and	)	CS Docket No. 98-82
Competition Act of 1992	)	
	)	
Implementation of Cable Act Reform	)	
Provisions of the Telecommunications Act of	)	CS Docket No. 96-85
1996	)	
	)	
The Commission's Cable Horizontal and Vertical	)	
Ownership Limits and Attribution Rules	)	MM Docket No. 92-264
	)	
Review of the Commission's	)	
Regulations Governing Attribution	)	MM Docket No. 94-150
Of Broadcast and Cable/MDS Interests	)	
	)	
Review of the Commission's	)	
Regulations and Policies	)	MM Docket No. 92-51
Affecting Investment	)	
In the Broadcast Industry	)	
	)	
Reexamination of the Commission's	)	MM Docket No. 87-154
Cross-Interest Policy	)	

**REPLY COMMENTS AND PETITION FOR RULEMAKING OF  
FOX ENTERTAINMENT GROUP, INC., NATIONAL BROADCASTING  
COMPANY, INC., THE WALT DISNEY COMPANY AND VIACOM, INC.**

Fox Entertainment Group, Inc., National Broadcasting Company, Inc., The Walt Disney Company and Viacom Inc. (collectively, the "Networks"), by their attorneys, hereby submit Reply Comments in the above-referenced proceeding. The Networks file these Reply Comments (1) to support reinstatement of the single majority shareholder exemption in the broadcast ownership context and (2) to urge the Commission to ensure the uniformity

of the attribution rules and standards applicable to cable horizontal ownership and broadcast multiple ownership limits.

This proceeding was prompted by the D.C. Circuit's decision in *Time Warner Entertainment Co. v. FCC*, 240 F.3<sup>rd</sup> 1126 (D.C. Cir. 2001) ("*Time Warner II*"), where the Court vacated and remanded two aspects of the Commission's cable attribution rules: the elimination of the single majority shareholder exemption and the prohibition on sale of programming by an insulated limited partner. The Commission has solicited comments on reinstatement of the single majority shareholder exemption for both cable and broadcast. However, it seeks comments on the so-called "no sale" rule only with respect to the cable limited partnership insulation criteria – criteria that the Commission has already relaxed for cable only. The Networks submit that this disparate approach to cable and broadcast ownership attribution criteria is neither rational nor fair. The Networks therefore petition the Commission to undertake the following actions:

First, the Commission should issue an Order, as it did in the context of the single majority shareholder exemption,<sup>1</sup> harmonizing the limited partnership insulation criteria for broadcast ownership with that for cable ownership pending the outcome of a rulemaking proceeding to resolve the inconsistent treatment. This Order should narrow the broadcast limited partnership insulation criteria as it did for cable in 1999. Limited partnership interests should be attributed only if there is material involvement in the "video programming" activities of the broadcast licensee (the standard applied to cable). And the Order should eliminate the "no-sale" application of the insulation criteria in the broadcast context if that application is not reinstated for cable.

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<sup>1</sup> *A Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interest*, FCC 01-353 (released December 14, 2001).

Second, the Commission should initiate a rulemaking proceeding that seeks to resolve the disparate treatment of broadcast and cable ownership with respect to insulation criteria for limited partners.

In addition, if the Commission grants the Petition for Rulemaking filed by the National Cable Television Association (“NCTA”) in this proceeding, the Networks urge that the resulting proceeding fully and equally reexamine the ownership attribution rules applicable to both broadcast and cable.

#### The Single Majority Shareholder Exemption

Several parties filing Comments in this proceeding have cogently explained the rationale for reinstatement of the single majority shareholder exemption for both cable and broadcast ownership.<sup>2</sup> Where a single shareholder controls a corporate entity, minority shareholders cannot control or exert meaningful influence over the corporation’s operations. The Commission’s equity/debt plus (“EDP”) benchmark also ensures that a minority shareholder cannot, by a combination of its ownership interest and other relationships, exert undue influence or control over the operations of a broadcast property. For these reasons, the single majority shareholder exemption should be reinstated for both broadcast and cable, and the EDP rule should limit the application of the exemption to cable ownership, just as it does for broadcast ownership.

#### The Limited Partnership Insulation Criteria

The Commission is considering the single majority shareholder exemption as it relates both to broadcast and cable, but its consideration of the “no-sale” rule aspect of the limited partnership insulation criteria is limited to the cable context. Although the Networks

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<sup>2</sup> See, e.g., Comments of Viacom, Inc. and Comments of the National Association of Broadcasters.

recognize the Commission is reacting to the Court's decision in *Time Warner II*, which was limited to cable ownership issues, there is no rational basis for disparate treatment of cable and broadcast in terms of ownership attribution criteria. Nor is it fair to relax the ownership attribution criteria for one distribution medium and not the other.

The Commission has always based its cable ownership attribution benchmarks on the broadcast ownership rules, recognizing that the criteria serve the same policy objective for both distribution media.<sup>3</sup> Recently, the Commission affirmatively concluded that there are no differences in the ownership, financing or management structures between the cable and broadcast industries that warranted creating ownership attribution standards for cable that were different than those used for broadcast ownership.<sup>4</sup> Despite this conclusion, however, in 1999 the Commission narrowed the limited partnership insulation criteria for purposes of the cable horizontal ownership and channel occupancy limits, providing that a limited partner must not be materially involved in the cable operator's "video programming-related" activities, instead of the broader "media-related" activities standard that applied – and continues to apply – to broadcast ownership.<sup>5</sup>

In the same Order in which the Commission relaxed the insulation criteria for cable, it also found that the underlying purposes of the broadcast ownership rules and the cable horizontal limits are the same – namely, promoting competition within the industry and

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<sup>3</sup> *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, 8580-81, 8591-92.

<sup>4</sup> *Review of the Commission's Cable Attribution Rules*, 14 FCC Rcd 19014, 19020, 19029, pars. 11, 33 (1999) ("1999 Attribution Order").

<sup>5</sup> *Id.* at 19040, pars. 63-64.

diversity of viewpoints and programming.<sup>6</sup> Yet, the Commission has never considered whether the “media-related” activities insulation criterion should also be narrowed for broadcast multiple ownership, even though the horizontal cable ownership limit and the broadcast national audience cap are directly analogous national ownership limits, and even though the same reasoning that prompted the narrower “video programming-related” activities standard in the cable context applies to broadcasting.<sup>7</sup>

In this proceeding the Commission is responding to the conclusion of the Court in *Time Warner II* that the Commission had not justified its application of the cable insulation criteria to bar programming sales between limited partners and cable operators – the so-called “no-sale” rule. Again, no change in the comparable insulation criteria that apply to broadcast ownership is contemplated, even though the conclusions of the D.C. Circuit with respect to the cable insulation criteria apply with equal force to the comparable provisions in the broadcast attribution rules.

The Networks agree with those Commenters who argue that the “no-sale” rule is irrational and fails to advance the purported goals of the Commission’s horizontal and vertical cable ownership regulations. We will not reiterate those arguments here. However, the same arguments would apply, for example, to the sale of syndicated programming to a broadcast station by a company that also owns a limited partnership or LLC interest in the station. In other words, it is equally unlikely that there is a rational connection between the arm’s length sale of programming by a limited partner to a station and “material

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<sup>6</sup> 1999 Attribution Order, 14 FCC Rcd at 19030, par. 35.

<sup>7</sup> 1999 Attribution Order, 14 FCC Rcd at 19040, pars. 63-64.

involvement” of the limited partner in the core management and operations of the broadcaster – the nexus the Court found wanting in *Time Warner II*.

#### Request for Commission Action

The Commission has not noticed for comment any change in its broadcast attribution rules other than the single majority shareholder exemption. In 1999 the Commission narrowed the scope of the limited partnership insulation criteria for cable only. The “no-sale” rule has been vacated by *Time Warner II* for cable only. Thus, broadcasters are already at an unfair and unjustified disadvantage in the application of the Commission’s attribution criteria. In order to redress this inequity, the Networks urge the Commission to:

- (1) Issue an Order that harmonizes the limited partnership insulation criteria for cable and broadcast, as indicated above, pending the outcome of a rulemaking proceeding.
- (2) Initiate a rulemaking to modify the limited partnership insulation criteria in the broadcast ownership attribution rules to mirror the comparable provisions in the cable attribution rules. At a minimum, the criteria should be narrowed to prohibit involvement in “programming-related,” not “media-related” activities. Moreover, if the Commission does not reinstate the “no-sale” rule for cable that was vacated by the D.C. Circuit, it should clarify that broadcast insulation criteria similarly do not prevent arm’s length programming sales by an entity with a limited partnership or LLC interest in the broadcast licensee. Since broadcasters are already playing on a tilted field when it comes to the Commission’s limited partnership insulation criteria, this rulemaking proceeding should be separate from any omnibus proceeding initiated

in response to the NCTA's Petition for Rulemaking, and should proceed on an expedited basis.

(3) Broadly address *all* the Commission's ownership attribution regulations and standards for *both* broadcast and cable if the Commission grants the NCTA's Petition for Rulemaking.

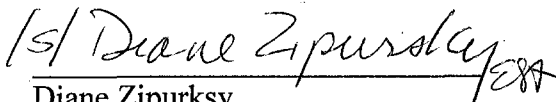
Respectfully submitted,



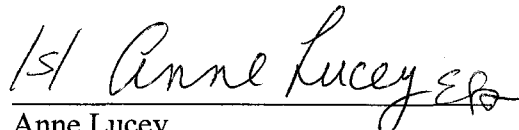
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